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Nos. 71-218, 71-238, 71-243

In the Supreme Court of the United States

OCTOBER TERM, 1971

RALPH GROUNDS, HENRY HITCH, ET AL. (LANDOWNERS), PETITIONERS

v.

NORTHERN NATURAL GAS COMPANY, ET AL.

NORTHERN NATURAL GAS COMPANY, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION, PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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STATEMENT

These consolidated cases involve the ownership of and payment for helium produced as a constituent

of natural gas from the Hugoton field located in Kansas, Oklahoma, and Texas, and purchased by the government pursuant to the Helium Act Amendments of 1960, Act of September 13, 1960, 74 Stat. 918, 50 U.S.C. 167 *et seq.* The parties include the class action representatives of the following groups: the owners of the pertinent mineral rights from which the gas is produced (collectively denominated the "Landowners," certain of whom are the petitioners in No. 71–218); entities which produce the gas from its natural location underground to the surface pursuant to leases with the Landowners (collectively denominated the "Lessee-producers"); and pipeline companies and their subsidiary or affiliated helium extraction companies, which purchase the gas from Lessee-producers under gas purchase contracts, separate the helium constituent, and sell the extracted helium to the government (collectively denominated the "Helex group"). The United States, which purchases the helium from the Helex group, is also a party, and, in general, is aligned with the Helex group.

The material facts are not in dispute and are set forth fully in the opinion of the court of appeals (App. A, 2a–38a;[1] 441 F. 2d 704) and in the Findings of Fact and Conclusions of Law of the district court (App. B, 39a–170a; 292 F. Supp. 619). Immediately prior to 1960, helium was used primarily to meet current demands and all extraction was effected by the government. The Helium Act Amendments of

[1] "App." refers to the separately-bound Appendix in No. 71–238.

1960 established a long-range program to conserve helium to meet future requirements.

The Amendments authorized the Secretary of the Interior to enter into long-term contracts for the purchase of partially extracted helium (a gas mixture containing about 50 to 70 percent helium) for storage underground. The Secretary entered into helium purchase contracts with four gas pipeline companies or their affiliates. In each contract, the seller warranted title to the helium or agreed to indemnify the government for all claims of third parties. The ultimate cost each seller might have to bear as a result of any such claims was limited, however, by various contract provisions.

Most of the gas mixture that is processed for helium extraction is produced under oil and gas leases. Generally, the lessee-producer sells the gas to a pipeline under a gas purchase contract; in some instances, a lessee-producer also has pipline facilities and retains the gas that it produces and sells the helium contained therein directly to the government. The gas purchase contracts customarily warrant title to all gas sold thereunder without reference to the various constituents that the gas actually contains.

Regulation of natural gas, which contains various hydrocarbon components, and of the helium constituent contained in it has long been separated between different federal agencies. Since the effective date of the Helium Act of March 3, 1925, 43 Stat. 1110, the Bureau of Mines of the Department of the Interior has conducted all government helium production ac-

tivities. The natural gas industry, on the other hand, has been regulated by the Federal Power Commission since the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. 717–717w, went into effect. The Helium Act Amendments of 1960 continue the historical separation of duties between these two governmental agencies (see Section 11 of the Amendments, 50 U.S.C. 167i).

In the present proceeding, eight actions were consolidated for trial. Two of these, known as the government cases, were brought by the Landowners against the government to determine ownership of the helium constituent of gas produced under oil and gas leases that they had granted. The government joined the four companies with whom it had helium purchase contracts as third-party defendants. The Helex group brought the other six suits as interpleader actions,[2] naming various Landowners and Lessee-producers as defendants. The government was not a party to any of the interpleader actions, but is interested in their outcome since in case of a title defect the helium sellers' liability is limited, which might result in a claim against the government.

The positions of the various groups can be summarized as follows. The Landowners contended that the leases under which they authorized production of gas cover only combustible hydrocarbon elements and not the heliun or other noncombustible constituents, so

[2] Phillips Petroleum Company, one of the four companies with whom the government had helium purchase contracts, was not a plaintiff in these suits.

that they are still the owners of the latter. The Lessee-producers asserted that the Landowners' production leases conveyed to them the helium constituent of the gas produced thereunder, but that their gas purchase contracts with the pipeline companies did not convey to the latter the helium constituent; they argued further that if the gas purchase contracts did convey to the pipeline companies the helium constituent, nevertheless the price which they receive for the gas, which generally is subject to Federal Power Commission regulation, does not apply to the helium constituent because of the Helium Act Amendments of 1960, and accordingly they are entitled to an additional payment from the pipeline companies for the helium constituent. The Helex group claimed that the gas purchase contracts conveyed the entire gas stream, including any helium constituent, to them, and that the price fixed by the contracts, even if modified by Federal Power Commission regulation, was payment for the helium as well.

The district court initially held that the interpleader actions were correctly brought, and, on interlocutory appeal, the court of appeals affirmed this ruling *per curiam* (App. D, 178a–179a; 327 F. 2d 1003 (C.A. 10, *en banc*)). Following an extensive trial on the merits, the district court held that the Landowners' leases conveyed to the Lessee-producers all rights to the helium constituent, and accordingly denied the Landowners' claims against the government (in the government cases) based on conversion, or on a taking under the power of eminent domain, of the helium constituent (App. B, 111a–132a). In the interpleader

actions, the district court held that the gas purchase contracts conveyed the helium constituent to the pipelines, and that the payments made by the pipelines to the Lessee-producers for the gas were full consideration for the helium constituent as well (App. B, 132a–154a).

Some eighty-eight appeals were taken from the district court's decision on the merits and from the allowance of costs. The court of appeals affirmed the holding in the government cases (App. A, 12a–22a). In the interpleader actions, it held that the gas purchase contracts conveyed the helium constituent to the pipeline companies, but concluded, contrary to the district court's holding, that Federal Power Commission regulation of the contracts served to abrogate the contract price provisions, so that the Lessee-producers were entitled to payment from the interpleaded fund for the reasonable value of the helium constituent in all gas processed for helium extraction under the government's helium conservation program (App. A, 22a–38a). The court based its conclusion on Section 11 of the Helium Act Amendments of 1960 (50 U.S.C. 167i), which excepts from Federal Power Commission jurisdiction under the Natural Gas Act of 1938 the helium constituent in helium-bearing natural gas. From this it reasoned that the price for gas sold under gas purchase contracts subject to Federal Power Commission regulation was payment only for the non-helium portion of the gas. Petitions for rehearing filed by the Helex group and by the government were denied, as was the Landowners' motion to file a petition for rehearing out of time.

DISCUSSION

The United States believes that the petitions for writs of certiorari in Nos. 71–238 and 71–243 should be granted. The petition for a writ of certiorari in No. 71–218 is out of time, and should therefore be denied.

1. The court below held that neither the Federal Power Commission nor the Secretary of the Interior has jurisdiction with respect to the value of the helium constituent in helium bearing natural gas, where the helium is extracted from the natural gas stream pursuant to the government's helium conservation program and the helium constituent was not dealt with separately in the gas purchase contracts. This is an important decision of first impression concerning the interrelationship between the Natural Gas Act of 1938 and the Helium Act Amendments of 1960.

a. The interaction between the Gas Act and the Amendments created, in the words of the court below, a "void" in which "[n]either the FPC [under the Gas Act] nor the Bureau of Mines [acting for the Secretary of the Interior under the Amendments] has jurisdiction over the helium value of the natural gas" (App. A, 36a). The Court of Appeals for the Eighth Circuit, however, in *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 359 F. 2d 675, reviewed carefully the purpose of the Amendments and their legislative history, and concluded that while they excluded Power Commission jurisdiction over the helium constituent itself, they did not "prevent the Commission from exercising jurisdiction over 'helium-bearing natural gas'" (359

F. 2d at 679), as to which the Commission could require compliance with its certification procedures.

The court below, on the other hand, gave little effect to the purpose and legislative history of the Amendments in finding that a "void" existed as to the helium value. Here, just as in *Panhandle Eastern,* it is clear that Congress intended that the Amendments would not terminate Power Commission jurisdiction over helium-bearing gas.

b. The court below further concluded that although the gas purchase contracts conveyed the helium constituent to the pipeline companies, the price provisions of those contracts were inoperative because they "have been superseded by FPC rate regulation," so that "the lessee-producers are entitled to the reasonable value of the contained helium" in the helium-bearing gas (App. A, 36a). The court held that Power Commission regulation of the maximum price obtainable under gas purchase contracts should not control as to the Lessee-producer's entitlement to payment for the helium constituent, since, in the court's view, the Helium Act Amendments precluded any Commission regulation of the price of the helium constituent. But neither the Amendments nor their legislative history mention this matter or suggest that Congress intended to abrogate the price provisions of gas purchase contracts entered into, in most instances, many years before.

c. Even on the basis of the court's own rationale, we think the decision below is deficient. Though the court based its holding that the helium value is not

fixed by the pricing provisions of the gas purchase contracts on the premise that "the price provisions thereof have been superseded by FPC rate regulation" (App. A, p. 36a), it then applied this holding to *all* helium bearing gas that is processed for helium extraction, regardless of whether the Power Commission actually regulates the price of the particular helium-bearing gas. As more fully set forth in the petition in No. 71–243 (pp. 13–18), the premise is not applicable in a number of instances, such as where the contract price does not exceed the Power Commission ceiling price, the contract is exempt from Power Commission regulation, or the lessee-producer sells the helium mixture directly to the government without selling to a pipeline.[3]

d. These cases are important, both on their own account and because of their effect on other litigation. The interpleaded fund itself amounts to many millions of dollars (see App. A, 34a; App. B, 107a).

[3] While the decision below was not based on unjust enrichment, the court does mention a possible "windfall" (App. A, 36a) for the Helex group if the Lessee-producers are not entitled to a separate payment for the helium value. The doctrine of unjust enrichment does not support the decision, since it has no application where, as here, there is an express contract. The facts of the present cases would not bring it into play in any event. The Helex group, not the Lessee-producers, made all investments necessary to carry out the helium conservation program envisaged under their contracts with the government and assumed all risks in connection therewith. Moreover, both courts below held that by virtue of the gas purchase contracts the Helex group actually owned the helium constituent. In these circumstances, it is clear the Helex group are not getting a "windfall" if they do not make a separate payment for the helium constituent.

And, as pointed out in the petitions in Nos. 71–238 (p. 25, n. *) and 71–243 (p. 19), the decision has already generated substantial additional litigation.

2. The petition in No. 71–218 is untimely. The judgment of the court of appeals (App. F) was entered on March 2, 1971. The government and members of the Helex Group filed timely petitions for rehearing, which the court denied on May 20, 1971 (App. H, I). The Landowners, who are the petitioners in No. 71–218, did not file timely petitions for rehearing; on June 8, 1971, they filed a motion for leave to file such petitions out of time, which the court below denied on June 9, 1971, "because it is untimely" (App. J, 209a).

The petitions for rehearing filed by other parties did not present any issue on behalf of the Landowners or pertaining to the court's judgment against them. As to the Landowners, therefore, the original judgment of the court controlled. Nor was the finality of that judgment suspended by reason of the Landowner's motion for leave to file a petition for rehearing out of time, since the petition "was not entertained or considered on its merits." *Bowman* v. *Loperena,* 311 U.S. 262, 266. Thus, the 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) began on the date of the court's original judgment, March 2, 1971, and expired on May 31, 1971. No extension of time was granted. The petition in No. 71–218 was not filed until August 12, 1971, and, since the statutory time limitation is jurisdictional, the petition should be denied.

CONCLUSION

For the reasons stated above, the petitions in Nos. 71–238 and 71–243 should be granted, and the petition in No. 71–218 should be denied.

Respectfully submitted.

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